

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

v.

Giordano Jackson,

Defendant/Movant.

No. CV 24-08126-PCT-DJH (MTM)

No. CR 17-08242-PCT-DJH

**REPORT AND RECOMMENDATION**

TO THE HONORABLE DIANE J. HUMETEWA, UNITED STATES DISTRICT  
JUDGE:

Movant Jackson, who is confined in the United States Penitentiary in Louisiana, filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. Doc. 1.

**I. SUMMARY OF CONCLUSION**

Movant was convicted of first-degree murder and multiple counts of assault. Movant is barred from relief under 28 U.S.C. § 2255 because he raises the same issue – arising from the prosecutor’s Closing Argument at trial – previously litigated on direct appeal. This Court will recommend that the Motion be denied and dismissed with prejudice.

**II. BACKGROUND**

**A. Conviction and Sentencing**

On November 12, 2018, in Arizona District Court, Movant was found guilty at trial of First-Degree Murder, Assault Resulting in Serious Bodily Injury, and two counts of

1 Assault with a Dangerous Weapon. CR 105.<sup>1</sup> At trial, the prosecution proved a prior  
 2 romantic relationship between Movant and the victim and documented the victim's  
 3 extensive and fatal wounds. *United States v. Jackson*, 2022 WL 331687, at \*1 (9<sup>th</sup> Cir. Feb.  
 4 3, 2022). Movant was sentenced on February 25, 2019 to life imprisonment for his first  
 5 degree murder conviction, and several concurrent terms of 120 months on other counts of  
 6 conviction. CR 137.

### 7 **B. Direct Appeal**

8 Movant timely appealed his conviction and sentence. Alleging prosecutorial  
 9 misconduct, Movant asserted that the prosecutor in Closing Argument had "misstated  
 10 evidence, argued matters not in evidence, exceeded the bounds of fair argument, and  
 11 wrongly deployed inflammatory rhetoric to emotionally incite the jury." CA9 36 at 64  
 12 [Appellant's Opening Brief].<sup>2</sup> The Ninth Circuit found that the prosecutor had not  
 13 committed misconduct. *Jackson*, 2022 WL 331687 at \*2. In a separate opinion, the Ninth  
 14 Circuit remanded for resentencing because it reversed Movant's conviction for a prior  
 15 kidnapping of the murder victim. *United States v. Jackson*, 24 F.4th 1308, 1315 (9<sup>th</sup> Cir.  
 16 2022). Movant was resentenced on September 20, 2022 to life imprisonment for his first  
 17 degree murder conviction as well as concurrent terms of 120 months for three counts of  
 18 assault. CR 182. Movant filed a timely Notice of Appeal. CR 185. On April 26, 2023 the  
 19 Ninth Circuit, after an independent review of the record in an *Anders* appeal, found that  
 20 Movant had not presented any arguable grounds for relief. CR 192.

### 21 **III. MOTION PURSUANT TO 28 U.S.C. § 2255**

22 On June 24, 2024, Movant filed his Motion under 28 U.S.C. § 2255. As summarized  
 23 by this Court, Movant asserts he received ineffective assistance of counsel based on trial  
 24 counsel's failure to object to prosecutorial misconduct during the prosecutor's closing  
 25 argument. Doc. 4. The United States filed a limited Response on September 17, 2024. Doc.  
 26 5. Movant replied on October 17, 2024. Doc. 6.

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27 <sup>1</sup> CR cites are to the district court docket.

28 <sup>2</sup> CA9 cites are to the Ninth Circuit docket.

As noted by the United States in its Response (doc. 5 at 8), Movant’s argument in his 28 U.S.C. § 2255 Motion repeats - *word for word* - his argument from his Opening Brief in his direct appeal of his first sentencing. *See* CA9 36 at 64. As he stated in his Opening Brief in his direct appeal, Movant again states:

the prosecutor misstated evidence, argued matters not in evidence, exceeded the bounds of fair argument, and wrongly deployed inflammatory rhetoric to emotionally incite the jury.

Doc. 2 at 6. Further, Movant’s supporting arguments in his § 2255 Motion, except for a few re-worded subheadings, are also a word for word repeat of his arguments from his Opening Brief on direct appeal. *See* Doc. 2 at 6-14 and his appellate brief at 54-61 from CA9 36.

Respondent asserts that the Motion violates a relitigation bar, because Movant’s “claim of error on appeal – alleged prosecutorial misconduct in closing argument – mirrors exactly the error he now claims his counsel should have objected to.” Doc. 5 at 9.

### **Relitigation Bar**

In Movant’s direct appeal, the 9th Circuit considered whether the prosecutor’s Closing Argument was misconduct:

[Movant] argues that the government committed misconduct in its closing arguments by alleging that [Movant], *inter alia*, searched for the murder weapon in his house, started beating the victim in his house, enjoyed domestic abuse, and lied about being intoxicated at the time of the murder.

\* \* \*

**The government’s arguments that [Movant] lied were not misconduct.** In a case like this one that “essentially reduces to which of two conflicting stories is true,” it is not unreasonable to argue “that one of the two sides is lying.” **The government’s graphic descriptions about [Movant’s] proclivities for domestic abuse** present a closer call, but on balance, **those arguments were “hard blows” tied to “reasonable inferences from the evidence.”** The government’s statements about [Movant’s] conduct in his home—searching for the weapon and beating the victim there – are arguably grounded in guesswork rather than inferences and evidence. **Nonetheless, [Movant] cannot establish plain error:** Given “the evidence supporting the jury’s verdict, we do not believe

1                   that permitting that verdict to stand constitutes a miscarriage of  
2                   justice.”

3                   *Jackson*, 2022 WL 331687 at \*2 (internal citations omitted, emphasis added).

4                   The “law of the case” governing Movant’s § 2255 motion, as established by the 9th  
5                   Circuit on direct appeal, is that the government’s Closing Argument was not misconduct  
6                   and not plain error. Accordingly, Movant is barred from relitigating whether the  
7                   prosecutor’s Closing Argument constituted objectionable misconduct. *See Egger v. United*  
8                   *States*, 509 F.2d 745, 748 (9<sup>th</sup> Cir. 1975) and *United States v. Ramirez*, 327 Fed. App’x  
9                   751, 752 (9<sup>th</sup> Cir. 2009).

10                  In his Reply, Movant asserts that his Motion is not barred, as he asserts it was  
11                  *ineffective assistance of counsel* for his counsel not to object to the same words in Closing  
12                  Argument that he argued on direct appeal were *prosecutorial misconduct*. Doc. 6 at 1-2.  
13                  As a practical matter, Movant’s argument fails, despite the new legal label he gives it,  
14                  because his trial counsel’s failure to object to the prosecutor’s argument was not ineffective  
15                  assistance under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), where the  
16                  prosecutor’s argument was not in fact misconduct. *See Rupe v. Wood*, 93 F.3d 1434, 1145  
17                  (9<sup>th</sup> Cir. 1996) (it is not deficient performance for trial counsel to fail to take a futile act),  
18                  and *Jones v. Ryan*, 691 F.3d 1093, 1101 (9<sup>th</sup> Cir. 2012) (“It should be obvious that the  
19                  failure of an attorney to raise a meritless claim is not prejudicial.”).

20                  Movant is not persuasive in his attempt to distinguish his § 2255 Motion from his  
21                  direct appeal. The 9th Circuit previously ruled upon the legal significance of the  
22                  prosecutor’s Closing Argument and whether it was misconduct. That holding resolves  
23                  Movant’s § 2255 Motion, despite the new label Movant applies to the same argument  
24                  previously presented on direct appeal. *See United States v. Currie*, 589 F.2d 993, 995 (9<sup>th</sup>  
25                  Cir. 1979) (applying relitigation bar to § 2255 Motion where issue was resolved on direct  
26                  appeal, because the “fact that the issue may be stated in different terms is of no  
27                  significance”); *see also United States v. Loglia*, 2016 WL 7013454 \*5 (D. Nev. Nov. 29,  
28                  2016) (where Ninth Circuit on direct appeal resolved defendant’s objection to a jury

1 instruction, district court applied relitigation bar to a § 2255 Motion, even though defendant  
 2 re-cast his argument as ineffective assistance of counsel, finding “[n]or does it matter that  
 3 defendant–Petitioner states his claim as ineffective assistance of counsel”).

4 The 9th Circuit explicitly stated that the prosecutor’s statements that Movant lied  
 5 and the “graphic statements” about Movant’s proclivities for domestic abuse were not  
 6 misconduct. *Jackson*, 2022 WL 331687 at \*2. Movant attempts to avoid the relitigation bar  
 7 by pointing to (doc. 2 at 15) additional statements<sup>3</sup> the 9th Circuit found were not plain  
 8 error though “arguably grounded in guesswork rather than inferences and evidence.” *Id.*  
 9 Movant argues that as to these statements, his counsel’s failure to object was ineffective  
 10 assistance of counsel. Doc. 2 at 15.

11 Movant fails in his attempt to carve out an exception for the prosecutor’s statements  
 12 that were found not to be plain error, because by that finding the 9th Circuit necessarily  
 13 found that Movant could not meet the higher standard required for a finding of ineffective  
 14 assistance of counsel. *See Ramirez*, 327 Fed. App’x at 752, noting that a holding on direct  
 15 appeal that an alleged error was harmless precludes a claim in a § 2255 Motion that the  
 16 same conduct was ineffective assistance of counsel. Put differently, if the alleged error was  
 17 not plain error, then trial counsel’s failure to object could not satisfy the prejudice prong  
 18 of *Strickland*. *Id.*

#### 19 **IV. CONCLUSION**

20 The Court finds that the Motion to Vacate, Set Aside, or Correct Sentence is barred  
 21 by a relitigation bar.

22 Accordingly,

23 **IT IS THEREFORE RECOMMENDED** that the Movant’s Motion be **DENIED**  
 24 and **DISMISSED WITH PREJUDICE**.

25 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave  
 26 to proceed in forma pauperis on appeal be **DENIED** because the dismissal of the Petition

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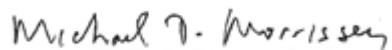
27  
 28 <sup>3</sup> The prosecutor’s statements about Movant’s “conduct in his home” in “searching  
 for the weapon” and “beating the victim there.” *Jackson*, 2022 WL 331687 at \*2.

1 is justified by a plain procedural bar and reasonable jurists would not find the ruling  
2 debatable.

3 This recommendation is not an order that is immediately appealable to the Ninth  
4 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
5 Appellate Procedure, should not be filed until entry of the district court's judgment. The  
6 parties shall have 14 days from the date of service of a copy of this Report and  
7 Recommendation within which to file specific written objections with the Court. *See* 28  
8 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have 14 days  
9 within which to file a response to the objections.

10 Failure to timely file objections to the Magistrate Judge's Report and  
11 Recommendation may result in the acceptance of the Report and Recommendation by the  
12 district court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114,  
13 1121 (9th Cir. 2003). Failure to timely file objections to any factual determinations of the  
14 Magistrate Judge will be considered a waiver of a party's right to appellate review of the  
15 findings of fact in an order of judgment entered pursuant to the Magistrate Judge's Report  
16 and Recommendation. *See* Fed. R. Civ. P. 72.

17 Dated this 27th day of March, 2025.

18   
19 Honorable Michael T. Morrissey  
20 United States Magistrate Judge  
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